BEFORE THE

Supreme Court of the United States

October Term, 1943

No.

NATHAN GOLDSMITH and THE MANHATTAN COFFEE & SUGAR COMPANY, INC.
Petioners, and Appellants below,

v.

UNITED STATES OF AMERICA,
Respondent, and Appellee below,

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE

The statement of the case in the foregoing petition is sufficient for the purpose of this brief as to the questions raised with the exception of the evidence on the insufficiency of the proof to sustain the charges made in the indictment. In this regard attention will be invited to the pertinent parts of the record. The brief discusses in order the three questions raised as shown on page 5 of the petition.

QUESTION No. 1

That the District Court Erred in Overruling the Motion of the Petitioners to Dismiss the Indictment Made at the Close of the Government Case (R. 210), and Again

Erred in Failing to Sustain the Motion to Dismiss the Indictment Made at the Close of All of the Testimony (R. 236) for the Reason That There Was No Evidence to Establish the Guilt of the Petitioners as a Matter of Law. That the Circuit Court Erred as a Matter of Law in Affirming the Judgment on This Ground.

The indictment charges in two counts (R. 6-8) that the petitioners, unlawfully, willfully and knowingly did make or cause to be made false statements in connection with the registration for the issuance of sugar certificates. The first count (R. 6) alleges that the petitioners had an inventory of 517,000 pounds of sugar whereas only 4,000 pounds of sugar was reported on the registration form. The second count alleges that the petitioners (R. 7-8) stated in the application for registration that they owned 00 pounds of sugar, whereas the petitioners on April 28, 1942, owned 517,000 pounds of sugar.

The question of whether there was sufficient evidence to sustain the allegations of both counts of the indictment turns on two questions of law.

The fact that the petitioners executed the applications in question did not constitute a crime. The petitioners were engaged in the lawful and legitimate business of buying and selling sugar, and has been so engaged since the year 1916 (R. 239). The first material question of law to be determined is whether the petitioners were the owners of 517,000 pounds of sugar on April 28, 1942, the date that the applications were signed.

The United States called a number of witnesses to show that the petitioners had an option on the sugar on this date. (R. 9, 17, 31, 44, 54, 57, 69, 82). To summarize the record shows the following transactions which are not disputed:

> April 10, 1942 (R. 374) 1200 bags of sugar to be shipped from Mobile. Contract with Hershey Sugar Sales Corporation.

April 10, 1942 (R. 352) 1070 bags of sugar. Contract with Olavarria & Co. To be shipped from Tampa. $500.00 was deposited on this account (R. 350).

April 10, 1942 (R. 344-345) 900 bags of sugar. Contract with Olavarria & Co.

April 24, 1942 (R. 370-371) 2000 bags of sugar. Contract with Olavarria & Co.

In three instances, the Finance Trust Company, and the Modern Industrial Bank took over the sugar (R. 42, 45). On the other contract, the David S. Stern Corporation took over 1070 bags of sugar (R. 57, 59).

None of the bills of lading or the warehouse receipts for the sugar was placed in the name of the petitioners (R. 456, 442, Gov. ex. 17, 426, Gov. ex. 15B, 356-357, 348). The petitioners on April 28, 1942, owned no sugar and at the most they had acquired an option or contract to buy sugar. Title to the sugar was in the bankers. The first time that the petitioners acquired any sugar which actually passed into their possession was on July 13, 1942 (R. 74).

Under these circumstances, the petitioners earnestly contend that they were not the owners of the sugar in question on April 28, 1942.

The question asked in the registration form was:

> "7. Present inventory (number of pounds of sugar now owned by registered unit)" (R. 364 Gov. ex. 4A)

which question was answered by the petitioners as follows "00 lbs."

The question asked on the retailers and wholesalers application was:

> "f. Present inventory (number of pounds of sugar now owned by registering unit for sale)"

which question was answered by the petitioners "4000 lbs." (R. 358 Gov. ex. 3, opposite page).

Neither of the forms contained any explanation as to the present inventory or of the words "now owned." The petitioners therefore had no guide to follow in the answering of the questions.

The petitioners contend that they have a right to construe the words "now owned" or "owned" as they are used in their customary and ordinary meaning. Webster's standard dictionary defines "now" as the "present time", and the word "own" or "owned" as "belonging to", to "possess or hold by right", and the word "ownership" is defined as "rightful possession".

In the case of *Baltimore Dry Docks & Ship Co.* v. *New York*, 262 Fed. 485, 488, the Fourth U. S. Circuit Court of Appeals said that the words "owned by" means an absolute and unqualified title.

In the case of *Morris Foundry* v. *Commissioner of Internal Revenue*, 52 Fed. (2) 839, the Sixth U. S. Circuit Court of Appeals held that although stockholders controlled at least 95% of the stock, that this was insufficient to come within the word "owned" under the revenue Act. See also the case of *U. S.* v. *Cleveland P. & E. R.R. Co.*, 42 Fed. (2) 413, which holds that the words "controls" and "owns" are not synonymous.

Where a church organization holds property under a contract for deed, it does not "own" such property for the purposes of exemption from taxation.

> *Peoples* v. *Logan Square Presbyterian Church*, 94 N. E. 155, 249 Ill. 9.

The word "owner" when used alone imports an absolute owner or one who has complete dominion of the property, as the owner in fee of real property.

> *McFeters* v. *Pierson*, 24 Pac. 1076, 1077, 15 Colo. 201.
> To the same effect:
> *Ramsey* v. *Leeper*, 168 Okla. 43, 31 Pac. (2) 852, 861.

The question has been decided authoritatively by the

Courts of the State of New York, favorable to the petitioners, under facts very similar to the facts in this case.

First National Bank v. *Dean*, 137 N. Y. 110, 117.
Moors v. *Kidder*, 106 N. Y. 43, 44.
F. & M. National Bank v. *Logan*, 74 N. Y. 568.

The question of ownership has also been decided by this Honorable Court under statement of facts very similar to the facts in this case.

Dows v. *National Exchange Bank*, 91 U. S. 618.
Gibson v. *Stevens*, 49 U. S. 384.
Halliday v. *Hamilton*, 78 U. S. 560, 564.

An exhaustive search of the authorities indicates that none of the above decisions of this Honorable Court has been overruled.

The decision of the Circuit Court in this case on the question of ownership clearly conflicts with the ruling of this Court in the case of *Dows* v. *National Exchange Bank*, supra. Under the law of the State of New York, the petitioners assert without fear of contradiction, that the petitioners did not own the sugar in question on April 28, 1942. Upon this basis alone the District Court should have sustained the motion to dismiss the indictment.

There Was No Evidence That the Petitioners Willfully and Knowingly Made False Statements

The United States proved only the execution of the registration forms. The forms contained no information as to the manner of execution (R. 358, Gov. ex. 3, opposite page, 364, Gov. Ex. 4A opposite page) or the explanation of the words "now owned". It was incumbent upon the United States to prove not only that the answers made by the petitioners were false, but that they were known to be false by the petitioners when made.

Hargrove v. *United States*, 67 Fed. (2) 820, 5th CCA.

The petitioner, Goldsmith attempted to ascertain what should be reported in the inventory, and was informed by the sugar trade, and in fact, by his counsel, that he did not have to report the sugar which he did not own (R. 244-251). The petitioner did not attempt to conceal the sale of any sugar made after the same had come into his possession. He regularly made reports of sale to the Alcohol Tax Unit (R. 244) as required. The petitioner, Goldsmith denied any intention to defraud the government (R. 256) when he signed the applications and asserted that he signed the same in good faith believing the facts stated to be true (R. 256).

No proof was offered by the United States to contradict this testimony of the petitioner, Goldsmith. There was no showing that the petitioner, Goldsmith had actual knowledge of any regulation requiring the sugar to be reported.

This proof was required before a verdict of guilty may be sustained under the decisions of this Court.

This Court held in the recent case of *Spies* v. *United States* (87 L. Ed. Adv. 342) that one could not be convicted under the Revenue Act of 1936 for a willful attempt in any manner to defeat or evade a tax without proof of some willful omission, such as an example of evil motive.

Willfully means something more than expressed by knowingly, else both terms would not be used.

United States v. *Ill. Central R.R. Co.*, 303 U. S. 239.

In the case of *Murdock* v. *United States*, 290 U. S. 389, at page 396, this Honorable Court said:

> "The word wilfully means more than voluntarily. * * * Congress did not intend that a person by reason of a bona fide understanding as to his liability for a tax, as to his duty to make a return, or as to the adequacy of the records maintained should become a criminal by his mere failure to measure up to the required standards of conduct * * * It follows that the respondent was entitled to his instruction as to his good faith."

While the above case was a prosecution under the Income Tax laws, the same principle applies in this case. Congress certainly never intended that a legitimate business man like the petitioner, Goldsmith, should become a criminal because he literally answered questions correctly, or made at the most an honest mistake. If the petitioner had answered the questions to the effect that he was the owner of the sugar the answers would have been false under the decisions of this Court, and the law as construed by Courts of New York.

Petitioners assert that under the decisions of this Honorable Court the District Court should have granted the motion to dismiss the indictment because of failure of proof.

QUESTION No. 2

That the District Court Erred in Instructing the Jury in Regard to the Ownership of the Sugar in Question, and That the Circuit Court Erred in Failing to Reverse the Judgment Upon This Ground.

The District Court charged the jury as follows (R. 337):

> "If the Manhattan Coffee and Sugar Company actually contracted with Olavarria and Hershey for the purchase of sugar and then borrowed money in order to complete the purchase or to make the purchase possible, the sugar was legally the property of the Manhattan Coffee and Sugar Company, just exactly as your house is your property although you have a mortgage on it, although you borrow money in order to make the purchase, it is your house."

This instruction was clearly erroneous. In the case of a purchase of a house, title by deed passes, together with the immediate right of possession of the property. Title to the sugar in question was not in the petitioners, the bankers held the title and had complete control and possession of the sugar. The only right that the petitioners had under the agreement was to exercise an

option to purchase, and upon a cash payment to obtain the sugar. The instructions on the title to the sugar are contrary to the law of New York, and the decisions of this Court which decisions are hereinbefore cited, and will not be repeated for the sake of brevity.

QUESTION No. 3

That the District Court Judge Erred in His Charge to the Jury, and by Refusing Requested Instructions and by Commenting at Length Upon the Evidence Offered by the United States, and in Making No Favorable Comment on the Evidence Offered by the Petitioners, But in Fact, Ridiculing the Contentions of the Petitioners, Which Comment of the Court, and Charge to the Jury Was in Effect a Direction to the Jury to Bring in a Verdict of Guilty on Both Counts of the Indictment Against the Petitioners. That the Circuit Court Erred in Not Reversing the Judgment on This Ground Alone.

The District Judge charged the jury (R. 328-337). In the charge, the Court commented as follows (R: 330):

> "I don't quite understand whether it was the defendant's position that he was not required to report the five thousand odd bags of sugar because they did not belong to him or whether it was his position that he just made an unfortunate error, or an error that was based upon an honest attempt to ascertain what his duty was, and then a failure to perform that duty through no evil purpose or merely because of the difficult situation that confronted him."
>
> "I say that I have not been able to come to a conclusion as what the defendant's theory is but I am bound to say to you that does not make any difference. The defendant is not required to present any theory. He has the right to remain mute in the face of any charge which is made in a criminal case, so it does not matter whether it is difficult to ascertain what the theory of the defense is. *I only refer to it because it might tend*

to explain the extended nature of the trial. (R. 331.) (Italics supplied.)

The above comment was excepted to by the petitioners (R. 337).

The petitioners do not dispute the right of the District Judge to make a fair comment on the evidence and facts in the case, but in so doing it was the duty of the Court to make a fair comment on the evidence offered by both parties, and to fairly review the evidence offered by the petitioners as well as that offered by the United States.

Starr v. *United States*, 153 U. S. 614, 626.
Hickory v. *United States*, 160 U. S. 408, 423.

In this case, the District Judge only commented on the unfavorable evidence offered by the petitioners, and the favorable evidence offered on the part of the United States, and, it is clear, in view of the above decisions that reversible error was committed by the trial Court. Most of the charge given by the trial Court was argument, such as is quoted above, to the effect that the Court could not understand the theory of the defense, and in effect, the petitioners had wasted the time of the Court and jury by a long trial when there was no defense to the criminal indictment.

The Court did not properly instruct the jury on the question of good faith and honest mistake which was a complete defense to the criminal charge. It is true that the Court did instruct the jury on the question of "intent", but the instructions in this regard were vague and misleading, and were totally destroyed by the comment of the Court quoted herein. The petitioners requested several instructions (R. 340) which would have cleared up the matter of good faith and honest belief. Requested instructions No. 3 and 5 (R. 340) would have covered the matter. Since the question was not adequately covered by the instructions of the trial Court the refusal to

grant the requested instructions constitutes reversible error. Exception was taken to the refusal to grant the requested instructions (R. 338).

In this connection see the case of *Murdock* v. *U. S.*, supra.

There are a large number of cases which support the position of the petitioner on all grounds which have been omitted for the sake of brevity. If this petition for the writ is granted by this Honorable Court a supplemental brief will be filed.

CONCLUSION

Your petitioners respectively urge that this Court grant the Writ of Certiorari petitioned herein.

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